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Supreme Court, U.S.
FILED
AUG 3 0 2007
OFFICE OF THE CLERK

(5)

No. 06-1716

IN THE SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Petitioners,

v.

CITY OF CRYSTAL LAKE, an Illinois municipal corporation,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Shirley A. Rockstead and Carol J. Henderson respectfully file this Reply to respondent City of Crystal Lake's Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

The respondent City's arguments against granting certiorari are without merit.[1]

First, the City argues that this case is not worthy of review "because a final state court decision has not been rendered." (Brief in Opp., pp. 2, 16). However, that is precisely the point: the issue here is whether this Court should reconsider *Williamson County's* rule requiring petitioners to litigate in state court to a final state judgment. The City simply begs the question.

Moreover, the City is wrong in arguing that the late Chief Justice Rehnquist's *San Remo* concurrence

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[1] The City asserts some facts outside the record about the ultimate merits of this case. (Brief in Opp., p. 7 n.2). Petitioners have conclusive responses that are also beyond the record in this case and therefore not appropriate for inclusion in this Reply. However, in this Court and at this stage, as in the two courts below, those matters are completely beside the point. As the district court ruled, all petitioners' well-pleaded factual allegations must be accepted as true, a ruling that neither side has disputed. (Pet. App. 17a). Therefore, there are no factual issues that might make this case unsuitable for review. SUP. CT. R. 10.

"suggested that the Court might reconsider Fifth Amendment takings claims based on a final decision of a state or local government entity." (Brief in Opp., pp. 2, 16). Rather his concurrence in *San Remo*, joined by Justices O'Connor, Kennedy and Thomas, recommended reconsidering whether a Takings plaintiff should be required to obtain a final state judgment before suing in federal court. *San Remo Hotel, L.P. v. County of San Francisco*, 545 U.S. 323, 349, 125 S. Ct. 2491, 2508 (2005) (Rehnquist, C.J., concurring).

Second, the City is wrong in arguing that "[t]he relief sought by the petitioners here is the very same as that which was considered and denied by this Court in *San Remo*." (Brief in Opp., pp. 2, 13-16).

As the Chief Justice pointed out in his *San Remo* concurrence, *Williamson County's* state-litigation rule was not before the Court in *San Remo* because "neither party . . . asked [the Court] to reconsider it, and resolving the issue could not benefit [the *San Remo*] petitioners." 545 U.S. at 352, 125 S. Ct. at 2510. In contrast, petitioners in this case are explicitly asking the Court to reconsider *Williamson County*, and resolving this issue in petitioners' favor would most definitely benefit them by reopening the doors of the federal court.

Third, the City is conspicuously silent about the fact that *Williamson County's* underlying textual rationale – *i.e.*, that the Fifth Amendment does not proscribe a taking, but only a taking without compensation (Brief in Opp., pp. 17-18) – is directly contrary to this Court's line of decisions in *physical takings* cases which hold that the constitutional violation occurs at the time of the taking.

United States v. Dickinson, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."); *United States v. Dow*, 357 U.S. 17, 22 (1958) ("The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking."); *United States v. Clarke*, 445 U.S. 253, 258 (1980) ("When a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued.'").

The City's failure to address this important issue underscores the lack of merit to the City's Opposition and emphasizes the need for this Court's reconsideration of *Williamson County*.

Fourth, the City disagrees with petitioners' assertion that the Illinois courts apply *Williamson County's* ripeness rules and quibbles about the Illinois Supreme Court's holding in *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994), even though that decision held the property owner's Section 1983 claim, brought in Illinois state court, to be "premature" explicitly on authority of *Williamson County*. *Id.*

What the City does not dispute, however, is its ability to remove petitioners' Section 1983 Takings claim from state court to federal court and obtain both the dismissal of that claim as unripe and the remand of the remainder of the case back to state court pursuant to the rules of *City of Chicago v. Int'l College of Surgeons*, 522

U.S. 156 (1997), and *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003). Thus, the City makes nothing of the obvious unfairness of allowing a governmental defendant to remove a Section 1983 Takings claim to the same federal court where a property owner is barred from filing that claim in the first place.[2]

Fifth, the City warns of dire consequences that will arise from overruling *Williamson County* – the "broad undesirable results" of rejecting "century-old precedent," "sending countless state disputes into federal court," and the need to reconsider the parallel Due Process line of cases, "such as *Parratt v. Taylor*, 451 U.S. 527 (1981)."[3]

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[2] Related to this point is the City's argument that because this Court has the power to review decisions of the Illinois Supreme Court, the requirements of *Williamson County* would still allow petitioners' Section 1983 Takings claim to be "heard in federal court." (Brief in Opp., p. 19). That argument is a non-sequitur because *Williamson County* prohibits petitioners from filing the Section 1983 claim in the federal district court; it has nothing to do with this Court's power of review of state court decisions.

[3] If review is accepted of this case, there will clearly be no need to reconsider *Parratt*, which is easily distinguishable as involving random unauthorized acts of state employees, not the considered conduct pursuant to a local governmental policy and procedure presented by this case. *See* Brief for Elizabeth Newmont et al. as *Amici Curiae* Supporting Petitioners 11-12. Moreover, petitioners cannot help but note that the City's citation of *Parratt* hardly makes the City's point because it was

(continued...)

(Brief in Opp., p. 20).

These are all straw men. While petitioners respect the general principles of stare decisis, *Williamson County*, decided in 1985, is hardly an ancient precedent. Nor does this case present a risk of flooding (perhaps a poor choice of a word in this case) the federal courts with land-use cases because it is of the class of physical takings cases that, as this Court has noted, "are relatively rare, easily identified and usually represent a greater affront to individual property rights," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002), and which "present[] relatively few problems of proof." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). Moreover, this case presents an even narrower issue: whether petitioners' further litigation in the Illinois appellate courts should be excused as futile because Illinois inverse condemnation law (which the federal courts are required to accept) is so clearly against them. (Pet., pp. 29-30). Furthermore, reconsideration of *Williamson County* will not require re-examination of other lines of cases because it is the outlier, inconsistent with the well-accepted rule that a Section 1983 plaintiff need not exhaust state remedies. (Pet., pp. 24-26). Reconsideration of *Williamson County* will likely conform it to several lines of decisions.

Chief Justice Rehnquist's *San Remo* concurrence persuasively explained that *Williamson County* "may have

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[3](...continued)
itself partially overruled a short five years later by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

been mistaken" and "has created some real anomalies" that justify its reconsideration. This case therefore falls within the class of cases that justify reconsideration because it is "outdated," "ill-founded," "badly reasoned," "unworkable" and "otherwise legitimately vulnerable to serious reconsideration." (Pet., pp. 13-14 citing cases).

There are powerful reasons supporting reconsideration of *Williamson County's* state-litigation rule – four Justices of this Court have said that it should be reconsidered and the Petition presents an additional set of persuasive reasons to do so. Yet, says the City, those reasons are not "compelling" and reconsideration of *Williamson County* should not be undertaken. (Brief in Opp., pp. 4, 21).

In contrast, the City argues that petitioners must pursue their Illinois appellate remedies and seek to overturn, or at least distinguish, the Illinois permanent flooding rule. Yet, the pertinent Illinois inverse condemnation decisions say nothing that suggests that the permanent flooding rule is subject to any question or ripe for reconsideration or distinguishable from this case. The most that can be conjured up is the "glimmering" the Court of Appeals saw (Pet. App. 6a), a light too faint for petitioners. Nevertheless, the City insists that petitioners must pursue a futile state appeal and seek to overturn a state law rule which the City itself has argued is "well-settled" and which, in any event, the federal courts are obligated to accept in the first instance. (Pet., pp. 29-30).

The City's self-contradictory arguments are painfully ironic. Worse, they are contrary to the "concepts of 'fairness and justice' that underlie the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001)

(internal citations omitted).

This case is clearly worthy of plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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